IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 271

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION,

Petitioner,

vs.

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

HOMER D. DINES,
122 S. Michigan Ave.,
Chicago, Illinois,

LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.,
Counsel for Petitioner.

WARREN H. ORR,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Charles H. Albers, as Receiver of Woodlawn Trust and Savings Bank, a corporation, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause

on the 29th day of April, 1940, reversing the decree of the District Court of the United States for the District of Columbia.

Opinions Below.

The findings of fact and conclusions of law of the District Court were promulgated on April 14, 1938, and appear in the record at pages 21 to 31, both inclusive. The opinion of the Court of Appeals for the District of Columbia appears in the record at pages 113 to 119, both inclusive, but has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals for the District of Columbia was entered on April 29, 1940, (R. 120). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U.S.C.A. 347.)

Statement.

The Woodlawn Trust and Savings Bank is an Illinois banking corporation, organized under the laws of the State of Illinois during the year 1905 (R. 22). In 1932 the State Auditor of Public Accounts of Illinois found that the capital stock of the bank was impaired and thereupon took control of the bank and appointed a receiver (R. 22). Charles H. Albers is the present receiver and the petitioner herein (R. 21). From 1911 until the closing of the bank in 1932 the bank had been a depository of postal savings funds (R. 22) and on the date of its closing held deposits of such funds to the amount of $454,793.04 (R. 25). To secure the repayment of deposits of postal savings funds, the bank at various times from 1911 to 1932, pledged, turned over and delivered to the Treasurer of the United States

(who is ex-officio Treasurer of the Board of Trustees of the Postal Savings System (R. 2)) various bonds which were a part of the assets of the bank (R. 22). As of April 14, 1938, William A. Julian, as Treasurer of the United States (ex-officio Treasurer of the Board of Trustees of the Postal Savings System), had possession of certain pledged bonds of the bank in the aggregate principal amount of $457,500 (R. 22-25). He had also received after the closing of the bank and had credited to the Board of Trustees of the Postal Savings System $106,657.96 principal and interest paid on bonds which had been pledged by the bank to secure deposits of postal savings funds. Of said money $16,000 represented the proceeds of redeemed bonds and $90,657.96 represented interest (R. 25).

On October 28, 1935, suit was instituted in the District Court of the United States for the District of Columbia by William L. O'Connell (petitioner's predecessor) as receiver of the bank against James A. Farley, Henry Morgenthau, Jr., and Homer S. Cummings, as Trustees of the Postal Savings System; William A. Julian as Treasurer of the United States and William A. Julian as Treasurer of the Board of Trustees of the Postal Savings System (R. 1), respondents herein, for the recovery of the pledged bonds and the $106,657.96 in money.

The basis of the suit was that under the decisions of the Supreme Court of Illinois (the highest court of that State), banks incorporated under the laws of the State of Illinois since the year 1887 have had no power to pledge assets to secure deposits, and that such pledging was *ultra vires*, against the public policy of the State of Illinois, and void. (*People* v. *Wiersema State Bank*, 361 Ill. 75, 197 N. E. 537; *People* v. *Cairo-Alexander Bank*, 363 Ill. 589, 2 N. E. (2d) 889.) Before those decisions of the Supreme Court of Illinois, this Court in *Marion* v. *Sneeden*, 291 U. S. 262, ap-

proved the conclusion reached by the United States Circuit Court of Appeals, Seventh Circuit, in *Sneeden* v. *City of Marion, Illinois,* 64 F. (2d) 721, that the State of Illinois had not conferred upon its banks the power to pledge assets to secure deposits of political subdivisions of the State, but said (p. 271) that an authoritative determination of the question could be given only by the highest court of the State; which authoritative determination by the highest court of the State was given in *People* v. *Wiersema State Bank, supra.*

The District Court held that the Woodlawn Trust and Savings Bank had no power or authority, under the laws of the State of Illinois, to pledge any of its assets to secure deposits of postal savings funds, and that the purported pledging of part of its assets, consisting of bonds, by said bank with the Treasurer of the United States to secure deposits of postal savings funds was *ultra vires,* illegal and void and contrary to the public policy of the State of Illinois (R. 29). The court also held that this is not a suit against the United States and that the United States is not a necessary or indispensable party to this suit (R. 29). The court therefore ordered the defendant William A. Julian, as Treasurer of the United States, to turn over and deliver to the petitioner herein the pledged bonds still held by him, and ordered the Trustees of the Postal Savings System to pay, or cause to be paid, to the petitioner herein, out of postal savings funds in their possession or under their control, $106,657.96 on account of moneys received by them or credited to their account by the Treasurer of the United States since the closing of the bank from principal of and interest on bonds pledged by the bank to secure deposits of postal savings funds; provided that simultaneously with such payment the receiver pay to said Trustees the amount of dividends payable to the Trustees as general creditors of the bank (R. 31-34).

The respondents appealed to the United States Court of Appeals for the District of Columbia. On April 29, 1940, the Court of Appeals reversed the decree of the District Court on the sole ground that the United States are necessary and indispensable parties to the suit (R. 119), and held that it was, therefore, without jurisdiction either to compel the Treasurer of the United States to surrender the bonds or to compel the Trustees of the Postal Savings System to make any payments out of moneys deposited in the Treasury of the United States earmarked as postal savings funds, which the Trustees controlled under the terms of the pertinent statute (R. 113-119).

Question Presented.

This petition therefore presents the sole question whether the United States are indispensable parties to the suit instituted by the petitioner herein.

Statutes Involved.

The statutes involved are set forth in full in the Appendix.

Specification of Errors To Be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the United States are necessary and indispensable parties to the suit brought by the petitioner for the recovery of the bonds and the payment of the moneys involved.

2. In holding that the deposit of the postal savings funds in the Woodlawn Trust and Savings Bank constituted the deposit of money of the United States.

3. In holding that even if the money deposited in the bank was not money belonging to the United States, nevertheless the deposit of the money created a debt due the United States.

4. In failing to hold that the petitioner herein was entitled to recover the securities illegally pledged with the Treasurer of the United States (ex-officio Treasurer of the Board of Trustees of the Postal Savings System) even though the deposit of postal savings funds with the bank created a debt due the United States.

5. In holding that it was without jurisdiction either to compel the Treasurer of the United States to surrender the bonds or to compel the Trustees of the Postal Savings System to make any payments out of moneys deposited in the Treasury of the United States earmarked as postal savings funds, and controlled by the Trustees of the Postal Savings System under the terms of the pertinent statute.

6. In reversing the decree of the District Court of the United States for the District of Columbia ordering the Trustees of the Postal Savings System to pay or cause to be paid to the petitioner herein, out of postal savings funds in their possession or under their control, $106,657.96 on account of moneys received by said Trustees or credited to their account by the Treasurer of the United States since the closing of the Woodlawn bank.

7. In reversing the decree of the District Court of the United States for the District of Columbia in favor of the petitioner and in failing to affirm said decree in all respects.

Reasons for Granting the Writ.

I.

This case involves matters of substantial importance in the administration of the Postal Savings Act (36 Stat. 814) and important questions of Federal law which should be settled by this Court.

II.

The decision of the United States Court of Appeals for the District of Columbia is in direct conflict with the decision of the Court of Claims of the United States in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States,* 69 Court of Claims Reports 79 (No. F-138, decided February 10, 1930).

In the *Leka case,* suit was brought in the Court of Claims to recover, from the United States, postal savings deposits which had been made in a depository office of the Postal Savings System. The Attorney General of the United States successfully defended that suit on the ground that the United States were not proper parties defendant and that a judgment could not be entered by the Court of Claims against the United States for postal savings deposits. The Court of Claims said at page 87 of 69 Court of Claims Reports:

> "Before passing to a discussion of the regulations promulgated by the board of trustees to effectuate the purposes enumerated, it may be well to pause here and note that there was created by this act a trust with named trustees, the deposits to be held as trust funds and to be held within the State or community where the deposit was made, and the withdrawals or repayments to be made at the place of deposit and from deposits within the State or community. Interest

was to be paid on the deposits, and as provided in the act interest was collected from the banks on the deposits held by them. No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government. Such being the case the Secretary of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government funds. The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment."

In the case at bar the United States Attorney and the Special Assistant to the Attorney General of the United States contended, and the Court of Appeals held, directly contrary to the holding in the *Leka case,* that the deposit of money in a postal savings depository creates the relationship of debtor and creditor between the United States and the depositor, and that the United States were, therefore, necessary and indispensable parties to this suit. The Court of Appeals said (R. 118-119):

"The fund in the present case originated in the deposit with the United States by its owners of money subject to withdrawal in all material respects as though it were deposited in a bank. When received, it was in due time deposited by the United States for safe-keeping in a bank, and security was taken for its repayment, all in accordance with the congressional mandate. The statute, under which it was received by the United States, gave the President the right to invest all or

any part of it when in his judgment the general welfare and public interest required. The credit of the United States was pledged for its repayment. This, at the very least, created as between depositor and government the relationship of debtor and creditor, and gave the United States full control of and full responsibility for its disposition."

Obviously the two decisions are directly in conflict on the questions involved, which the Court of Appeals regarded as controlling in this case, namely:

1. Whether postal savings funds constitute money belonging to the United States.

2. Whether a deposit in a postal savings depository creates a debt or liability of the United States.

3. Whether the Secretary of the Treasury has any fund with which to pay a judgment against the United States for postal savings deposits, and, therefore,

4. Whether the United States were necessary and indispensable parties to the suit.

If, as held by the Court of Claims in the *Leka case,* the deposit of funds by a depositor in a postal savings depository does not confer ownership of the deposited funds upon the United States nor create a liability of the United States which can be enforced against the United States in the Court of Claims, it follows that the deposit of those same funds in the Woodlawn bank by a postmaster to the credit of the Postal Savings Trustees was not a deposit of funds of the United States and did not create a debt due from the bank to the United States. Yet the Court of Appeals held that the deposits here involved constituted deposits of money belonging to the United States or in any event created a debtor and creditor relationship between

the bank and the United States. We think that it is impossible to reconcile the two decisions.

The Court of Appeals, in holding that the United States were necessary and indispensable parties to the suit, emphasized that the faith and credit of the United States were pledged for the repayment of postal savings funds. That point was also considered by the Court of Claims in *Annie Leka, Administratrix* v. *The United States, supra,* and disposed of as follows:

> "While the act contained the following provision:
>
> " 'That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon, as herein provided,'
>
> "this clearly means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds; but this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. The United States has nowhere in this act provided for a suit against it or consented to be sued. We might stop here with the conclusion that this court has not judicial power to give judgment. The contract involved is not with the United States. It is a contract providing that the depositor is to be paid out of the funds deposited under the postal saving system, and the act itself and the regulations promulgated in pursuance thereof are written into and became a part of the contract. Under the regulations the money received was deposited to the credit of the board of trustees. (See Finding IX.) The checks and drafts for payment were drawn against this account of the board of trustees."

Thus on this point the decision of the Court of Appeals is again in conflict with the decision of the Court of Claims in the *Leka case.*

III.

The Court of Appeals confused the issues in this case. The issues presented to and decided by the District Court were (1) whether the United States are necessary parties to a suit by this petitioner to recover possession of assets illegally pledged with and delivered to the Treasurer of the United States, who is ex-officio Treasurer of the Board of Trustees of the Postal Savings System, to secure the repayment of deposits of postal savings funds in the Woodland Trust and Savings Bank; and (2) whether the United States are necessary parties to a suit by this petitioner to recover moneys received by or credited to the account of the Trustees of the Postal Savings System from bonds illegally pledged by Woodlawn Trust and Savings Bank to secure the repayment of deposits of postal savings funds in said bank.

In its opinion, the Court of Appeals finds that the bank was without power to pledge its assets to secure the repayment of deposits of postal savings funds, and such pledging was, therefore, under the decision of the Supreme Court of Illinois in *People ex rel. Nelson* v. *Wiersema Bank,* 361 Ill. 75, 197 N. E. 537, *ultra vires,* illegal and void (R. 115-117). That finding is in accordance with the conclusions of law of the District Court (R. 29). That finding entitled the petitioner herein to an order for the return of the pledged securities held by the Treasurer of the United States because they were wrongfully held by him, and where an officer of the United States wrongfully holds property it is not necessary to make the United States a party defendant in order to recover the same, as hereinafter shown.

Instead of deciding the question involved, *i.e.*, whether the United States had such an interest in or claim to the securities wrongfully held by the Treasurer of the United States as required the United States to be made a party to this suit to recover possession thereof, the Court of Appeals held that the petitioner herein could not recover the pledged securities because the money deposited in the bank, to secure the repayment of which the securities were illegally pledged, was money of the United States, or at least money in which the United States have an interest, and that therefore the United States are indispensable parties (R. 117). This is not a suit to recover any postal savings funds deposited in the bank. Therefore the ownership of those funds was not the determining factor in this case. Even though the United States owned or had an interest in the money deposited in the bank, as held by the Court of Appeals, it acquired no interest in or claim to the securities which were illegally pledged by the bank to secure the repayment of those deposits. If, as held by the Court of Appeals, the pledging of the securities by the bank was *ultra vires*, illegal and void, it is inconceivable that the United States could have or claim an interest in the securities delivered to and held by the Treasurer of the United States under the illegal and void pledge. The property sought to be recovered in this suit consisted of illegally pledged securities—not postal savings funds.

IV.

The decision of the Court of Appeals is not in accord with the decisions of this Court in other cases involving the question whether the United States were necessary and indispensable parties to suits brought against an instrumentality of the United States or an officer of the United States or an entity holding property in which the United States has an interest.

In concluding that the United States were necessary and indispensable parties to the suit, the Court below said (R. 118):

> "It is not a suit against an individual, who happens to be an official, to recover property wrongfully taken by him under asserted government authority. It is rather a suit to control property which he holds by statutory authority and in which the United States have an interest and as to which he can act only within the limits of the law."

We think that this is an erroneous statement because this is a suit against William A. Julian, who happens to be an official, to recover property which the Court of Appeals finds was wrongfully taken by him under asserted Government authority, and it is not a suit to control property which he holds by statutory authority because the Act of Congress did not authorize him to take illegal pledges to secure deposits of postal savings funds.

The Court holds in effect that the Postal Savings System is an instrumentality in which the United States have an interest and that the United States are therefore necessary and indispensable parties to a suit brought against the Trustees of the Postal Savings System. We think that this conclusion of the Court is not in accordance with the decisions of and the principles laid down by this Court in the following cases: *U. S. Bank* v. *Planters' Bank,* 9 Wheat. 904, 908; *National Bank* v. *Commonwealth,* 9 Wall. 353; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 279; *Sloan Shipyards* v. *U. S. Fleet Corp.,* 258 U. S. 549; *United States* v. *Lee,* 106 U. S. 196; *Davis* v. *Gray,* 16 Wall. 203; and *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381.

The Bank of the United States was an instrumentality of the United States, (*McCullough* v. *State of Maryland,*

4 Wheat. 316), and yet this Court held that the United States was not a party to suits brought by or against the Bank. (*U. S. Bank* v. *Planters' Bank, supra.*) National banks are instrumentalities of the United States, (*Farmers' etc. Nat. Bank* v. *Dearing,* 91 U. S. 29, 33), but the right of a plaintiff to sue a national bank to recover moneys or securities has never been denied on the ground that the bank is an agency or instrumentality of the United States and that, therefore, the suit is, in effect, or in essence, one against the United States; nor has it ever been held that the United States is a necessary party to a suit against a national bank where the only relief sought is against the bank itself. On the contrary the liability of national banks to be sued for debts was expressly stated in *National Bank* v. *Commonwealth, supra,* and in *Davis* v. *Elmira Savings Bank, supra.*

In *Sloan Shipyards* v. *U. S. Fleet Corp., supra,* 258 U. S. 549, this Court said (pp. 566-567):

> "The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v.

Bank of United States, 9 Wheat. 738, 842, 843; *United States* v. *Lee*, 106 U. S. 196, 213, 221. The opposite notion left some traces in the law, 1 Roll. Abr. 95, Action sur Case, T., but for the most part long has disappeared.

"If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

We think that the words of the Court in that case certainly apply to a suit against the Trustees of the Postal Savings System. Instead of creating a corporation, the Act of Congress created a board of trustees, consisting of persons, who are answerable for their wrongful acts, and who can be sued in their capacity as trustees without any express power as in the case of corporations.

In *United States* v. *Lee, supra,* this Court considered the question whether an ejectment suit against individuals holding land as officers and agents of the United States could be maintained, and held that it could be maintained and that the suit was not one in essence against the United States. The Court said (pp. 207-208):

"On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."

This Court quoted the following from *Davis* v. *Gray*, 16 Wall. 203 (p. 215):

> "'Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* * * *.'
>
> "Though not prepared to say now that the court can proceed against the officer in 'all respects' as if the State were a party, this may be taken as intimating in a general way the views of the court at that time." (Italics ours.)

In the recent case of *Keifer & Keifer* v. *R. F. C.*, *supra*, this Court fully considered its prior decisions in cases where it was contended that the United States were necessary parties to suits against an instrumentality of the Federal Government, or that the instrumentality was immune from suit because such suit was in effect one against the United States. In that case the suit was against a Regional Agricultural Credit Corporation, created by the Reconstruction Finance Corporation pursuant to an Act of Congress. The capital stock of the Regional Agricultural Credit Corporation was owned by the Reconstruction Finance Corporation and its affairs were managed by appointees of Reconstruction Finance Corporation. The suit was one in tort against a Regional Agricultural Credit Corporation. In holding that Regional Agricultural Credit

Corporation was not immune from suit on the ground that it was an instrumentality of the Federal Government, this court said:

> "* * * the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States* v. *Lee*, 106 U. S. 196, 213, 221; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 567.
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> * * *
>
> "Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? * * *
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> * * *
>
> "* * * We should be denying the recent trend of Congressional policy to relieve Regional from liability."

Neither does the fact that the Treasurer of the United States is a party to the suit require that the United States be made a party thereto.

The Treasurer of the United States is, by the Act of Congress creating the Postal Savings System, constituted the Treasurer of the Board of Trustees. (Sec. 759, Title 39, U. S. Code.) The assets delivered to him by the Woodlawn bank were delivered to him merely as pledgee and not to be covered into the United States Treasury as property belonging to the United States or to be disbursed in accordance with any Act of Congress. He recognized the capacity in which he received those assets by issuing receipts therefor which recited that he received them "in trust for this bank," meaning in trust for the Woodlawn bank (R. 26, Add. R. 18). This suit against the Treasurer of the United States was, therefore, not one to recover

funds or property of the United States in his hands, but was a suit to recover from him property which had been illegally pledged with him and which he holds as pledgee in trust for the Woodlawn bank to secure deposits to the credit of the Trustees—not deposits to the credit of the United States—in the Woodlawn bank, and which, because of such illegal pledging, it is his duty to return to the receiver of the Woodlawn bank.

We think that under the decisions of this Court in *Houston* v. *Ormes*, 252 U. S. 469 and *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, the United States are not necessary and indispensable parties to this suit.

In *Houston* v. *Ormes, supra,* a suit in equity was brought by Lockwood in the Supreme Court of the District of Columbia to establish an equitable lien for attorney's fees upon a fund of $1,200 in the Treasury of the United States, appropriated by Congress to pay a claim found by the Court of Claims to be due to one Sanders, who was made defendant with the Secretary of the Treasury and the Treasurer of the United States. The principal contention was that because the object of the suit and the effect of the decree were to control the action of the Secretary of the Treasury and the Treasurer of the United States in the performance of their official duties, the suit was in effect one against the United States, but this Court held otherwise. The Court said (p. 472):

> "But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official

charged with its performance is not a suit against the government."

In *Orinoco Co.* v. *Orinoco Iron Co.*, 296 F. 965, the Court had before it a case in which suit was brought by the Orinoco Iron Company against the Secretary of the Treasury and the Treasurer of the United States to recover moneys which had been paid into the Treasury of the United States as a trust fund to be distributed among the beneficiaries under a protocol between the United States and Venezuela whereby Venezuela agreed to pay to the United States $385,000 as damages resulting from the action of revolutionists in dispossessing certain concessionaires and the subsequent action of Venezuela in canceling the concessions. The Secretary of the Treasury and the Treasurer of the United States challenged the jurisdiction of the court on the ground that the suit was in essence a suit against the United States and that the United States was a necessary party, but the court said (p. 972):

> "The iron company is not seeking in this suit to recover anything from the United States. It is conceded, and properly so, that the money in question is held in the treasury as a trust fund. The government has no claim to it and it makes none. No matter what the outcome of the suit might be, the government would receive none of the fund. For this reason the suit is not against the United States, as argued by the appellants."

Upon appeal by the Secretary of the Treasury and the Treasurer of the United States, this Court, in *Mellon* v. *Orinoco Iron Co., supra,* affirmed the decree of the lower court upon the authority of *Houston* v. *Ormes, supra.*

We therefore respectfully submit that the decision of the Court below is not in accord with the decisions of this Court in the cases hereinbefore discussed.

V.

The decision of the Court of Appeals is in conflict in principle with the decisions of the Second and Fifth Circuit Courts of Appeal on the question whether the United States are necessary and indispensable parties to suits brought against government instrumentalities or entities holding property in which the United States have an interest. In *Panama R. Co.* v. *Minnix*, (C. C. A. 5) 282 F. 47, the Circuit Court of Appeals considered a suit brought against a corporation in which the United States was the sole stockholder and held:

> "The liability of the Panama Railroad Company to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is the sole stockholder."

In *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.*, 294 F. 641, the United States Circuit Court of Appeals for the Second Circuit held that the United States is not a necessary and indispensable party in a suit brought against an instrumentality of the United States.

CONCLUSION.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOMER D. DINES,
122 South Michigan Avenue,
Chicago, Illinois.

LLEWELLYN A. LUCE,
937 Munsey Building,
Washington, D. C.
Counsel for Petitioner.

WARREN H. ORR,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The findings of fact (R. 20-29) and conclusions of law (R. 29-31) of the District Court of the United States for the District of Columbia are unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 113-119) is as yet unreported.

Questions Presented, Statutes Involved, Etc.

A statement of the questions presented, statutes involved, jurisdiction, specification of errors to be urged and a statement of the case will be found in the foregoing petition.

Summary or Argument.

The United States were not indispensable parties to the suit here involved for the following reasons:

I. Postal savings funds do not belong to the United States and the deposits of such funds in the Woodlawn Trust and Savings Bank did not create a debtor and creditor relationship between the Bank and the United States.

II. The fact that the faith of the United States is pledged to the repayment of deposits in Postal Savings depository offices does not require that the United States be made a party to this suit.

III. The fact that the Treasurer of the United States is a party to this suit does not make the action one against the United States nor require that the United States be made a party.

IV. The fact that the Postal Savings System is an instrumentality of the United States does not prevent a suit against the Trustees of the Postal Savings System nor render the United States an indispensable party to a suit brought against the Trustees.

Accordingly the Court below erred in concluding that it was without jurisdiction either to compel the Treasurer of the United States to surrender the bonds or to compel the Trustees to make any payments out of monies deposited in the Treasury of the United States, earmarked as postal savings funds, which funds are controlled by the Trustees of the Postal Savings System under the terms of the Postal Savings Act.

ARGUMENT.

I.

Postal savings funds do not belong to the United States and the deposits of such funds in the Woodlawn Trust and Savings Bank did not create a debtor and creditor relationship between the bank and the United States.

The Court below held that the deposit of the Postal savings funds in the Woodlawn Trust and Savings Bank was a deposit of money belonging to the United States (R. 117) or at least that a debtor and creditor relationship had been created between the original depositor in the Postal Savings System and the United States (R. 118). This was one of the reasons for the conclusion of the Court that the United States were necessary and indispensable parties to the suit.

However, as pointed out in the petition attached hereto, the decision of the Court below is in conflict with the decision of the Court of Claims in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States,* 69 Court of Claims Reports 79 (decided February 10, 1930). In that case the Court of Claims referred to the postal savings fund made up of deposits in the various Postal Savings Depositories and said:

> "No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government. Such being the case the Secretary of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government

> funds. The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment."

We think that the Court of Claims reached the correct conclusion in the *Leka case.*

The Postal Savings System was established by the Act of June 25, 1910, entitled "An Act to establish postal savings depositories for depositing savings at interest with the security of the Government for repayment thereof, and for other purposes." (U. S. Stat., Second Session, 61st Cong., p. 814). The Act *"created a board of trustees"* for the *control, supervision and administration* of the postal savings depository offices, *and of the funds* received as deposits at such postal savings depository offices. That board is composed of the individuals holding the offices of Postmaster General, Secretary of the Treasury and Attorney General, and the personnel of the board changes as changes occur in the persons holding those offices, but those officers do not act in their respective governmental capacities of Postmaster General, Secretary of the Treasury and Attorney General in controlling, supervising and administering the postal savings depository offices and the funds received as deposits at such offices, but *in the capacity of trustees.* For whom do they act as trustees? The answer necessarily is, for the persons who deposit money in the postal savings depositories established under the Act, because such depositors are entitled to be repaid out of the funds so deposited or out of the proceeds of any securities in which the funds may be invested, and no part of such funds belongs to the United States, nor can the

United States use any of such funds for governmental purposes unless it borrows from the trustees and gives its bonds promising repayment thereof.

Inasmuch as under the decision of the Court of Claims in the *Leka case* the deposit of funds by a depositor in a postal savings depository office does not confer ownership of those funds upon the United States nor create a liability of the United States which can be enforced against it by the depositor in the Court of Claims, it is inconceivable that the deposit of those funds in a bank by a postmaster to the credit of the Trustees is a deposit of funds of the United States or creates a debt due from the bank to the United States. As we have already shown, the Trustees of the Postal Savings System, in whom the title to all such funds necessarily vests, are trustees for the depositors, and not trustees for the United States. The depositors are the beneficiaries of the trust and the equitable owners of the fund. Congress recognized this fact by providing for the loaning of monies from the fund by the Trustees to the United States, which is inconsistent with any theory of ownership by the United States, and is inconsistent with the theory that the United States becomes a debtor when a depositor makes a deposit in a postal savings depository office. Section 16 of the Act (Appendix, p. 46) which provides that the faith of the United States is solemnly pledged to the payment of deposits made in postal savings depository offices, is wholly inconsistent with the theory that the United States is the owner of the funds so deposited or that the United States becomes the debtor when a deposit is made in a postal savings depository office, because such guaranty would not be necessary, but would be meaningless, if Congress intended that the deposit of funds by a depositor in a postal savings depository office conferred upon the United States owner-

ship of those funds or created a debt due from the United States to such depositor.

The deposits of Postal Savings funds by postmasters in the Woodlawn Trust and Savings Bank were, therefore, not deposits of funds belonging to the United States, and did not create a debt to the United States, either within the meaning of the term "public money," as used in Section 332 of Title 12, U. S. C. A. or within the meaning of "debts due to the United States," as used in Section 3466 R. S. (31 U. S. C. A., Sec. 191).

The Court of Appeals for the District of Columbia, in its decision, relied upon *Richmond, Fredericksburg & Potomac Railroad* v. *McCarl*, 61 App. D. C. 290, 62 F. (2d) 203 (R. 118).

However, the fund under consideration in that case was the general railroad contingent fund created and maintained by the payment of excess income by railroads to the Interstate Commerce Commission in compliance with an Act of Congress, which provided that the fund should be administered by the Commission in the furtherance of the public interest in railway transportation through loans to carriers. The court said that the excess to be paid to the Commission pursuant to the Act was not a tax, like other taxes, payable into the Treasury of the United States for ordinary governmental use, and that the United States possessed no direct beneficial interest in the fund in the sense in which they control the public revenues, but that the United States, through the instrumentality of the Interstate Commerce Commission, hold it, when and as it is paid, as trustee and upon the trusts named in the Transportation Act. The court then said (62 F. (2d) 206):

> "These trusts, as we have seen, authorize the Commission to use it for loans to the weaker carriers or

to the purchase of railway equipment and facilities for their benefit. The act provides that the fund shall be under the control of the Commission and be used by that body in accordance with the purposes of the act, and these purposes are clear and explicit. But, while it is payable to the Commission, and the Commission is required to collect it, and while its disbursement is under the supervision of the Commission, the Commission as such acts as an instrumentality of the United States. *It is, as we think and as was stated by the Supreme Court, an appropriation by the United States of a fund which, for the purposes expressed in the act—i. e., public uses—they have the right to preempt and control.* It is money, therefore, which the carrier has collected and holds as trustee for the United States, and which the United States have a right to demand and receive likewise as trustee, and though it is not moneys which should, or may be covered into the Treasury under section 3617, R. S. (title 31, U. S. C. A. sec. 484), or withdrawn therefrom under section 305, R. S. (title 31, U. S. C. A. sec. 147), which two sections relate to the manner in which funds belonging to the United States shall be deposited and withdrawn from the Treasury, and though the language of the act clearly shows that the fund should not be administered or controlled by the Secretary of the Treasury in the ordinary method relating to public funds, but should be administered by the Interstate Commerce Commission, *the fact remains that the money is payable, if properly due, to the United States, and is subject to such disbursement and control 'for public uses' as Congress may declare.''* (Italics ours.)

The same cannot be said of monies deposited in postal savings depositories. The United States has no right

under the Postal Savings Act to appropriate or pre-empt Postal Savings funds for public uses. The Postal Savings funds are private funds administered by trustees, who act as trustees for the depositors—not as trustees for the United States.

The United States does not occupy the relation of trustee to Postal Savings funds, as the Act of Congress establishing the Postal Savings System specifically designated the trustees who should have the control, supervision and administration of the funds received as deposits at postal savings depository offices, and all of the provisions of the Act are inconsistent with the theory that the United States should have possession and control of Postal Savings funds as trustee, or that the deposit of such funds in a bank to the credit of the Trustees of the Postal Savings System should create a debt to the United States.

II.

The fact that the faith of the United States is pledged to the repayment of deposits in postal savings depository offices does not require that the United States be made a party to this suit.

In its decision the Court below emphasized (R. 118) that the credit of the United States was pledged for the repayment of money deposited in the Postal Savings System and indicated that for this reason the United States were necessary and indispensable parties to the suit.

Section 16 of the Postal Savings Act (Appendix, p. 46) provides that the faith of the United States is solemnly pledged to the payment of the deposits in the Postal Savings depository offices with accrued interest thereon as provided in the Act. However, the deposits in the Woodlawn

Bank were not made to the credit of the United States, or to any governmental department or officer thereof, but to the credit of the Trustees of the Postal Savings System (R. 22) and as shown hereinabove under Point I of this brief, deposits in the Postal Savings depository office do not create a debtor and creditor relationship between the United States and the depositor.

The certificate issued to the depositors in the Postal Savings System is reproduced on page 109 of the record. The certificate is no different from the Act of Congress (Sec. 766, Title 39, U. S. Code). The certificate and the provision of the Act of Congress are merely to the effect that the United States guarantees the repayment of deposits made in postal savings depository offices, with interest accrued thereon. However, the fact that one is a guarantor of debts incurred by another in the operation of his business certainly does not require the guarantor to be made a party to a suit to recover assets illegally pledged to secure the deposit of funds of the debtor in a bank, even though recovery of the assets so illegally pledged may result in the guarantor being ultimately required to pay something under his guaranty. As shown by the Court in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States, supra,* the provision of the Act of Congress creating the Postal Savings System that the faith of the United States is solemnly pledged to the payment of the deposits made in Postal Savings depository offices, with accrued interest, means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds, but that this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. Nowhere in the record herein does there appear any evidence showing that if the illegally

pledged assets and their proceeds are returned to the receiver of the bank, as required by the decree, there will not remain sufficient funds in the hands of the Trustees of the Postal Savings System to discharge all liabilities to depositors. Therefore this record does not show that the United States is in any way financially affected by the decree in this case.

But even though an obligation of the United States to make good any deficiency in the funds of the Postal Savings System to meet the obligations incurred by the Trustees in the operation of the System might arise by reason of the return to the receiver of the Woodlawn Bank of the assets which were illegally pledged to secure deposits of Postal Savings funds in that bank and the repayment of the monies credited to the Trustees on account of principal and interest received by the Treasurer from pledged assets, still that would not make a suit by the receiver of the bank against the Trustees and the Treasurer to recover the illegally pledged assets and the monies received from pledged assets, a suit in essence one against the United States or require that the United States be made a party to that suit.

Neither the pledged assets nor the proceeds of the pledged assets belong to the United States and have not been covered into the Treasury, nor is there any law under which they can be so covered as funds of the United States. The securities which the Treasurer has are assets of the bank out of which all creditors are entitled to be paid ratably. In these circumstances it is of no consequence what the United States may or may not do about any deficiency in Postal Savings funds, if one should exist. The question is whether there was a valid authorization of the pledge. If there was not, the Treasurer must restore the pledged assets to the receiver of the Woodlawn Bank, and

the Trustees must refund the proceeds from the illegally pledged assets which have been credited to their account by the Treasurer.

In *U. S. Bank* v. *Planters' Bank*, 9 Wheat. 904, the jurisdiction of the court was challenged in a suit brought against a bank on the ground that the State of Georgia was one of the incorporators and a member of the bank, and that the suit was, therefore, in effect, one against the State of Georgia and could not be maintained because the State was immune from suit. The contention in that case was obviously based on the ground that the State of Georgia would or might sustain some loss if the plaintiff prevailed, but the court said (p. 906):

> "A suit against the Planters' Bank of Georgia is no more a suit against the State of Georgia, than against any other individual corporator. The State is not a party, that is, an entire party, in the cause."

And on page 907 the court further said:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in Banks are not suable even in their own Courts; yet they never exempt the corporation from being sued."

In that case it is apparent that the enforcement of a judgment against the Planters' Bank would indirectly have

affected the finances of the State of Georgia, just as the enforcement of the decree in this case might indirectly affect the finances of the United States, but, as said in the Planters' Bank case, that does not bar a suit against parties who can be sued on the ground that a sovereign who cannot be sued without its consent may be affected financially by the outcome of the suit. The question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States. *Tindal* v. *Wesley*, 167 U. S. 204.

III.

The fact that the treasurer of the United States is a party to this suit does not make the action one against the United States nor require that the United States be made a party.

The Treasurer of the United States is, by the Act of Congress creating the Postal Savings System, constituted the Treasurer of the Board of Trustees. (Sec. 759, Title 39, U. S. Code.) The assets delivered to him by the Woodlawn Bank were delivered to him merely as pledgee and not to be covered into the United States Treasury as property belonging to the United States or to be disbursed in accordance with any Act of Congress. He recognized the capacity in which he received those assets by issuing receipts therefor, which recited that he received them "in trust for this bank," meaning in trust for the Woodlawn Bank (R. 26, Add. R. 18). This suit against the Treasurer of the United States was, therefore, not one to recover funds or property of the United States in his hands, but was a suit to recover from him property which had been illegally pledged with him and which he holds as pledgee in trust for the Woodlawn Bank to secure deposits to the credit of the Trustees—not deposits to the credit of the

United States—in the Woodlawn Bank, and which, because of such illegal pledging, it is his duty to return to the receiver of the Woodlawn Bank. To say that such a suit against the Treasurer is in essence one against the United States, or that the United States is an indispensable party to such suit, is, in effect, saying that no suit can be brought against the Treasurer of the United States to recover money or property illegally held by him because such suit is one in essence against the United States or that the United States is an indispensable party to any suit against its Treasurer. Such is not the law, as shown by the case of *Houston* v. *Ormes,* 252 U. S. 469, referred to on pages 18 and 19 of the preceding petition.

To the same effect is *Orinoco Co.* v. *Orinoco Iron Co.,* 296 F. 965, affirmed in *Mellon* v. *Orinoco Iron Co.,* 266 U. S. 121, referred to on page 19 of the preceding petition.

Likewise, in this case the petitioner is not seeking to recover anything from the United States and in no event will the United States receive any of the proceeds of the pledged assets if the pledge is foreclosed by sale or collection of the assets by the Treasurer of the United States as pledgee. That part of such proceeds required to pay in full the deposits of Postal Savings funds in the Woodlawn Bank would necessarily be paid over by the Treasurer to the Board of Trustees of the Postal Savings System and any balance remaining to petitioner.

IV.

The fact that the Postal Savings System is an instrumentality of the United States does not prevent a suit against the Trustees of the Postal Savings System nor render the United States an indispensable party to a suit brought against the Trustees.

This point is closely related to propositions I, II and III discussed hereinabove in this brief and the authorities

cited in support of these points are equally applicable under this division of the argument, and, likewise the authorities here cited are applicable to and support the points heretofore made in this brief.

The real parties in interest in this suit are the receiver, representing the general depositors and creditors of the Woodlawn Bank, and the Trustees of the Postal Savings System, representing the depositors in postal savings depository offices.

The conclusion of the court below that a suit against the Trustees is in essence a suit against the United States appears to be based upon the theory that the Postal Savings System, which is not a legal entity, or the Trustees, consisting of individuals, or both combined, constitute an instrumentality of the Federal government, and that a suit against the instrumentality is a suit in essence against the United States. The same proposition has been asserted in numerous cases in an attempt to defeat the enforcement of valid claims against instrumentalities of the Federal government, but has not met with favor by the courts unless the effect of the judgment or decree to be entered would be to control or obstruct some governmental function of the Federal government or to affect funds or property admittedly belonging to the United States.

The fact that the Postal Savings System is an instrumentality of the United States does not render the Trustees immune from suit nor does it require the United States to be made a party to a suit against the Trustees. That is shown by the cases referred to on pages 13 to 15 of the foregoing petition and also by the following cases:

In *Panama R. Co.* v. *Minnix,* (C. C. A. 5) 282 F. 47, the court said (p. 49):

"The liability of the Panama Railroad Company to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is the sole stockholder."

In the brief of the Attorney General filed on behalf of the Fleet Corporation in *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549 (555-560), the Attorney General classified into five general classes the suits which, although brought against an officer or agent of the Government, are not considered suits against the sovereignty, citing cases falling within each class. His fifth class is as follows:

"(5) To recover specific property, real or personal, because of the present wrongful action of an official, in good faith, and under color of office, unlawfully withholding plaintiff's property under the erroneous belief that the law authorized such withholding."

That class includes this case.

In *Osborn* v. *U. S. Bank,* 9 Wheat. 738, the United States Supreme Court said (p. 870):

"Where right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title."

In *Sloan Shipyards* v. *U. S. Fleet Corporation, supra,* 258 U. S. 549, the court said with reference to the liability of the Fleet Corporation to be sued (pp. 567-568):

"The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act."

In *United States* v. *Lee,* 106 U. S. 196, referred to on pages 15 and 16 of the foregoing petition, the court said (pp. 215-216):

> "This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson, Brown* v. *Huger,* and *Grisar* v. *McDowell,* it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

It would unduly and unnecessarily prolong this brief to quote from the numerous decisions holding that a suit against an instrumentality of the United States or against an officer of the United States is not necessarily a suit against the United States or a suit to which the United States is a necessary party. We, therefore, merely refer to additional cases in which it was so decided as follows: *Federal Sugar Ref. Co.* v. *U. S. Sugar Equalization Board,*

Inc., 268 F. 575; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.* (C. C. A. 2), 294 F. 641; *Merchants Fleet Corp.* v. *Harwood*, 281 U. S. 519; *Panama R. Co.* v. *Curran*, 256 F. 768; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Keiffer & Keiffer* v. *R. F. C.*, 306 U. S. 381.

CONCLUSION.

It is therefore respectfully submitted that the United States Court of Appeals for the District of Columbia erred in deciding that the United States were necessary and indispensable parties to this suit and for the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOMER D. DINES,
122 S. Michigan Ave.,
Chicago, Illinois,

LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.,
Counsel for Petitioner.

WARREN H. ORR,
Of Counsel.

APPENDIX.

Statutes relating to Postal Savings System.

Section 1 as originally adopted in part provides (36 Stat. 814—June 25, 1910):

"That there be, and is hereby, created a board of trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Act, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Postmaster-General, the Secretary of the Treasury, and the Attorney-General, severally, acting *ex officio*, and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices."

Section 1 as amended (39 U. S. Code, 751):

"There shall be a board of trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this chapter, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Postmaster General, the Secretary of the Treasury, and the Attorney General, severally, acting *ex officio*, and, except as otherwise provided by section 768 of this title, shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repay-

ment of the funds deposited at postal savings depository offices.

"The board of trustees shall submit a report to Congress at the beginning of each regular session showing by States and Territories (for the preceding fiscal year) the number and names of post offices receiving deposits, the aggregate amount of deposits made therein, the aggregate amount of withdrawals therefrom, the number of depositors in each, the total amount standing to the credit of all depositors at the conclusion of the year, the amount of such deposits at interest, the amount of interest received thereon, the amount of interest paid thereon, the amount of deposits surrendered by depositors for bonds issued by authority of this chapter, and the number and amount of unclaimed deposits. Also the amount invested in Government securities by the trustees, the amount of extra expense of the Post Office Department and the Postal Service incident to the operation of the postal savings depository system, and all other facts which it may deem pertinent and proper to present."

Section 3 (39 U. S. Code 753):

"Every post-office designated by order of the Postmaster General is declared to be a postal savings depository office within the meaning of this chapter and to be authorized and required to receive deposits of funds from the public and to account for and dispose of the same, according to the provisions of this chapter and the regulations made in pursuance thereof.

Section 7 (39 U. S. Code 757):

"Interest at the rate of two per centum per annum shall be allowed and entered to the credit of each depositor once in each year, the same to be computed on

such basis and under such rules and regulations as the board of trustees may prescribe; but interest shall not be computed or allowed on fractions of a dollar.

Section 8 (39 U. S. Code 758):

"Any depositor may withdraw the whole or any part of the funds deposited to his or her credit, with the accrued interest, upon demand and under such regulations as the Postmaster General may prescribe. Withdrawals shall be paid from the deposits in the State or Territory, so far as the postal funds on deposit in such State or Territory may be sufficient for the purpose, and, so far as practicable, from the deposits in the community in which the deposit was made. No bank in which postal savings funds shall be deposited shall receive any exchange or other fees or compensation on account of the cashing or collection of any checks or the performance of any other service in connection with the postal savings depository system."

Section 9 (39 U. S. Code, 759):

"Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than 2¼ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the Board of trustees, in lawful money as a reserve.

The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. If one or more member banks of the Federal reserve system exists in the city, town, village, or locality where the postal savings deposits are made, such deposits shall be placed in such qualified member banks substantially in proportion to the capital and surplus of each such bank, but if such member banks fail to qualify to receive such deposits, then any other bank located therein may, as hereinbefore provided, qualify and receive the same. If no such member bank and no other qualified bank exists in any city, town, village, or locality, or if none where such deposits are made will receive such deposits on the terms prescribed, then such funds shall be deposited under the terms of this chapter in the bank most convenient to such locality. If no such bank in any State or Territory is willing to receive such deposits on the terms prescribed, then such funds shall be deposited with the treasurer of the board of trustees and shall be counted in making up the reserve of 5 per centum. Such funds may be withdrawn from the treasurer of said board of trustees, and all other postal savings funds, or any part of such funds, may be at any time withdrawn from the banks and savings depos-

itory offices for the repayment of postal savings depositors when required for that purpose. If at any time the postal savings deposits in any State or Territory shall exceed the amount which the qualified banks therein are willing to receive under the terms of this chapter, and such excess amount is not required to make up the reserve fund of 5 per centum hereinbefore provided for, the board of trustees may invest all or any part of such excess amount in bonds or other securities of the United States. When, in the judgment of the President, the general welfare and interests of the United States so require, the board of trustees may invest all or any part of the postal savings funds, except the reserve fund of 5 per centum herein provided for, in bonds or other securities of the United States. The board of trustees may in its discretion purchase from the holders thereof bonds which have been or may be issued under the provisions of section 760 of this title. Interest and profit accruing from the deposits or investment of postal savings funds shall be applied to the payment of interest due to postal savings depositors, as hereinbefore provided, and the excess thereof, if any, shall be covered into the Treasury of the United States as a part of the postal revenue. Postal savings funds in the treasury of said board shall be subject to disposition as provided in this chapter, and not otherwise. The board of trustees may at any time dispose of bonds held as postal savings investments and use the proceeds to meet withdrawals of deposits by depositors."

Section 10 (39 U. S. Code, 760):

"Any depositor in a postal savings depository may surrender his deposit, or any part thereof, in sums of $20, $40, $60, $80, $100, and multiples of $100 and $500,

and receive in lieu of such surrendered deposits, under such regulations as may be established by the board of trustees, the amount of the surrendered deposits in United States coupon or registered bonds of the denominations of $20, $40, $60, $80, $100, and $500, which bonds shall bear interest at the rate of 2½ per centum per annum, payable semiannually, and be redeemable at the pleasure of the United States after one year from the date of their issue and payable twenty years from such date, and both principal and interest shall be payable in United States gold coin of the present standard of value. The bonds herein authorized shall be issued only (first) when there are outstanding bonds of the United States subject to call, in which case the proceeds of the bonds shall be applied to the redemption at par of outstanding bonds of the United States subject to call, and (second) at times when under authority of law other than that contained in this chapter the Government desires to issue bonds for the purpose of replenishing the Treasury, in which case the issue of bonds under authority of this chapter shall be in lieu of the issue of a like amount of bonds issuable under authority of law other than that contained in this chapter. The bonds authorized by this chapter shall be issued by the Secretary of the Treasury under such regulations as he may prescribe. The authority contained in section 759 of this title for the investment of postal savings funds in United States bonds shall include the authority to invest in the bonds herein authorized whenever such bonds may be lawfully issued. The bonds herein authorized shall be exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority. No bonds authorized by this chapter

shall be receivable by the Treasurer of the United States as security for the issue of circulating notes by national banking associations."

Section 12 (39 U. S. Code, 762):

"Postal savings depository funds shall be kept separate from other funds by postmasters and other officers and employees of the Postal Service, who shall be held to the same accountability under their bonds for such funds as for public moneys; and no person connected with the Post Office Department shall disclose to any person other than the depositor the amount of any deposits, unless directed so to do by the Postmaster General. All statutes relating to the safekeeping of and proper accounting for postal receipts are made applicable to postal savings funds, and the Postmaster General may require postmasters, assistant postmasters, and clerks at postal savings depositories to give any additional bond he may deem necessary."

Section 15 (39 U. S. Code, 765):

"All the safeguards provided by law for the protection of public moneys, and all statutes relating to the embezzlement, conversion, improper handling, retention, use, or disposal of postal and money-order funds and the punishments provided for such offenses are hereby extended and made applicable to postal savings depository funds, and all statutes relating to false returns of postal and money-order business, the forgery, counterfeiting, alteration, improper use or handling of postal and money-order blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor, with the penalties provided in such statutes are hereby extended and made appli-

cable to postal savings depository business, and the forgery, counterfeiting, alteration, improper use or handling of postal savings depository blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor."

Section 16 (39 U. S. Code, 766):

"The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 271

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION,

Petitioner,

vs.

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM,

Respondents.

Reply Brief for Petitioner.

HOMER D. DINES,
122 S. Michigan Ave.,
Chicago, Illinois,

LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.,
Counsel for Petitioner.

WARREN H. ORR,
Of Counsel.

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CITATIONS

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Respondents.

Reply Brief for Petitioner.

The respondents have filed a brief in opposition in which it is urged that the petition for certiorari should be denied because there is no conflict in decisions and the decision of the court below is correct. Although we believe that substantially all of the points raised by the respondents were covered in the petition for certiorari and brief in support thereof, it is desired to specifically reply to certain of the respondents' arguments.

ARGUMENT.

I.

The respondents contend that the decision of the Court of Claims of the United States in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States*, 69 Court of Claims Reports 79, is not in conflict with the decision of the court below (Brief, pp. 7-10). As one ground for this position, the respondents urge (Brief, p. 9) that the court below did not mean what it said in the following paragraph of its opinion:

> "The fund in the present case originated *in the deposit with the United States* by its owners of money, subject to withdrawal in all material respects as though it were deposited in a bank. When received, it was in due time *deposited by the United States* for safekeeping in a bank, and security was taken for its repayment, all in accordance with the congressional mandate. * * * The credit of the United States was pledged for its repayment. This, at the very least, created as between depositor and government *the relationship of debtor and creditor*, and gave the United States full control of and full responsibility for its disposition. * * *" (R. 118-119.) (Italics ours.)

If this were true then certainly the depositor of money in a Postal Savings depository could maintain an action in the Court of Claims to recover his deposits, which the Court of Claims in the *Leka* case held could not be maintained by a depositor because the debt due on the deposit was not a liability of the United States payable out of its funds, but was payable out of the funds in the hands of the

trustees of the Postal Savings System. (See p. 8 of Respondents' Brief.)

The court below certainly must have meant what it said for the above quoted paragraph was the only basis of the decision. This is made clear by the statements which directly follow the portion of the opinion quoted above, viz.:

> "* * * To say, in these circumstances, that a suit—the result of which will be to cut the fund in half—may be prosecuted without the United States as necessary parties, would be going too far. In exacting the pledge under which the bonds were delivered, appellants acted in accordance with the statute. If the pledge was illegal, it was nevertheless a pledge *given to the United States* to secure deposits of money *for which the government was responsible.* * * *" (R. 119.) (Italics ours.)

On the contrary the Court of Claims in the *Leka* case said at page 87 of 69 Court of Claims Reports:

> "Before passing to a discussion of the regulations promulgated by the board of trustees to effectuate the purposes enumerated, it may be well to pause here and note that there was created by this act *a trust with named trustees,* the deposits to be held as trust funds and to be held within the State or community where the deposit was made, and the withdrawals or repayments to be made at the place of deposit and from deposits within the State or community. Interest was to be paid on the deposits, and as provided in the act interest was collected from the banks on the deposits held by them. *No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government.* Such being the case the Secretary

of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government funds. *The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment.*" (Italics ours.)

This, we believe, shows a direct conflict between the two decisions and certainly the language of the court below is clear and unambiguous in declaring (R. 118) that "This, at the very least, created as between depositor and government the relationship of debtor and creditor, * * *."

The Court of Appeals held in the case at bar that the pledge under which the bonds were delivered, even though illegal, was nevertheless a pledge given to the United States (R. 119). We believe that the record is clear that the pledge was not given to the United States.

The Treasurer of the United States is, by the Act of Congress creating the Postal Savings System, constituted the Treasurer of the Board of Trustees. (Sec. 759, Title 39, U. S. Code.) The assets delivered to him by the Woodlawn Bank were delivered to him merely as pledgee and not to be covered into the United States Treasury as property belonging to the United States or to be disbursed in accordance with any Act of Congress. He recognized the capacity in which he received those assets by issuing receipts therefor, which recited that he received them "in trust for this bank," meaning in trust for the Woodlawn Bank (R. 26, Add. R. 18). This suit against the Treasurer of the United States was, therefore, not one to recover funds or property of the United States in his hands, but was a suit to recover from him property which had

been illegally pledged with him and which he holds as pledgee in trust for the Woodlawn Bank to secure deposits to the credit of the Trustees—not deposits to the credit of the United States—in the Woodlawn Bank, and which, because of such illegal pledging, it is his duty to return to the receiver of the Woodlawn Bank.

In fact, under the decision of the Court of Claims in the *Leka* case, and as shown by the provisions of the Postal Savings Act, the monies deposited in the Woodlawn Bank were not funds of the United States and the bonds were accordingly not pledged to secure funds of the United States. The funds deposited in the Woodlawn Bank were the funds of the depositors in the Postal Savings System which were held in trust by the trustees of the Postal Savings System.

With respect to the responsibility of the United States, the decision of the court below is again in conflict with the decision of the Court of Claims in the *Leka* case in which the Court of Claims said:

> "While the act contained the following provision:
>
> " 'That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon, as herein provided,'
>
> "this clearly means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds; but this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. The United States has nowhere in this act provided for a suit against it or consented to be sued. We might stop here with the conclusion that this court has not judicial power to give judgment. *The contract in-*

volved is not with the United States. It is a contract providing that the depositor is to be paid out of the funds deposited under the postal saving system, and the act itself and the regulations promulgated in pursuance thereof are written into and became a part of the contract. Under the regulations the money received was deposited to the credit of the board of trustees. (See Finding IX.) The checks and drafts for payment were drawn against this account of the board of trustees." (Italics ours.)

Even though an obligation of the United States to make good any deficiency in the funds of the Postal Savings System to meet the obligations incurred by the Trustees in the operation of the System might arise by reason of the return to the receiver of the Woodlawn Bank of the assets which were illegally pledged to secure deposits of Postal Savings funds in that bank and the repayment of the monies credited to the Trustees on account of principal and interest received by the Treasurer from pledged assets, still that would not make a suit by the receiver of the bank against the Trustees and the Treasurer to recover the illegally pledged assets and the monies received from pledged assets, a suit in essence one against the United States or require that the United States be made a party to that suit.

Neither the pledged assets nor the proceeds of the pledged assets belong to the United States and have not been covered into the Treasury, nor is there any law under which they can be so covered as funds of the United States. The securities which the Treasurer has are assets of the bank out of which all creditors are entitled to be paid ratably. The only question is whether there was a valid authorization of the pledge. If there was not, the Treasurer must restore the pledged assets to the receiver of the Woodlawn Bank, and the Trustees must refund the proceeds

from the illegally pledged assets which have been credited to their account by the Treasurer.

The respondents say that the court below considered the Postal Savings System a part of the United States Government and had no distinction in mind between the system and the government proper (Brief, p. 9).

If this be so a definite conflict is created because the Court of Claims held in the *Leka* case that the deposit of funds by a depositor in a postal savings depository *does not* confer ownership of the deposited funds upon the United States and does not create a liability of the United States which can be enforced against the United States.

Moreover, the brief of respondents (p. 9) admits the distinction between the Postal Savings System funds and funds of the United States by saying "It was, of course, the Postal Savings System with which the money was deposited and which in turn deposited it in a bank," and that "the opinion shows that the court did not mean to say that the United States as distinguished from its instrumentality, the Postal Savings System, was the debtor of the depositor and had control of and responsibility for the disposition of the deposit."

It would appear from this passage in the respondents' brief that they not only admit the distinction between postal savings funds and funds of the United States but also assert and urge that the court below did not mean to say that the United States as distinguished from the trustees of the Postal Savings System were responsible for the disposition of postal savings funds.

As is shown in our brief in support of the petition (pp. 33-37) the fact that the Postal Savings System is an instrumentality of the United States does not prevent a suit against the trustees of the Postal Savings System nor render the United States an indispensable party to a suit

brought against the trustees. This point will be further discussed herein in answer to respondents' argument (Brief, p. 11) that the United States is a necessary party to the suit on the theory that the Postal Savings System is a government instrumentality.

II.

The respondents contend (Brief, p. 10) that "the quotations from the opinion below and from the *Leka* opinion upon which petitioner relies as establishing a conflict are but *dicta.*"

We have hereinbefore quoted from the opinions in the two cases, and it is respectfully submitted that the opposite conclusions reached by the two courts do not constitute *dicta* but are the very bases of their respective decisions. Under the decision of the Court of Claims in the *Leka* case the deposit of funds by a depositor in a postal savings depository office does not confer ownership of these funds upon the United States nor create a liability of the United States which can be enforced against it in the Court of Claims. On the other hand the court below held that these same funds were deposited with the United States; that a *debtor and creditor relationship* was established between the United States and the depositor (R. 118).

If the funds were not funds of the United States, as held in the *Leka* case, the deposit of these same funds by a postmaster in the Woodlawn Bank could not create a debt due from that bank to the United States.

On page 10 of respondents' brief it is said that the court below held that the United States was an indispensable party because the suit sought to establish title to property in which the United States had an interest. The United States could not legally have or claim any interest in

property which admittedly had been illegally pledged to secure deposits of Postal Savings funds. Those securities necessarily belonged to the receiver.

III.

The respondents urge (Brief, p. 11) that the decision of the court below is not in conflict with the decisions of this Court and other courts discussed at pages 12 to 20, inclusive, of the petition for certiorari under Points IV and V of the reasons for granting the petition. The cases were cited on the question whether the United States are necessary and indispensable parties to a suit brought against an instrumentality of the United States or an officer of the United States or an entity holding property in which the United States has an interest.

The respondents refer (Brief, p. 11) to the following cases cited by the petitioner: *United States Bank* v. *Planters' Bank*, 9 Wheat. 904; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549; *Merchants Fleet Corporation* v. *Harwood*, 281 U. S. 519; and *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

The respondents then say:

> "In such cases the question is whether Congress intended that the instrumentality should enjoy the Government's immunity, and the intention, if not expressed, is to be determined by consideration of various relevant circumstances. In the case at bar there is no express congressional consent to suit against the trustees, and petitioner does not point to any circumstance from which an implied consent is to be inferred."

We respectfully submit that no express or implied Congressional consent is required for suit against the trustees of the Postal Savings System, because the suit is against individuals, as trustees, and not against a corporation, and no specific authority is required to sue individuals as in the case of corporations; and even where the suit is against a corporation created by Congress, and no provision is made for suit against such corporation, it was held that the corporation was not immune from such suit on the ground that it was an instrumentality of the Federal Government. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. We think that the decision of this Court in *Sloan Shipyards* v. *United States Fleet Corporation, supra,* is a complete answer to the respondents' argument on the question of express or implied consent. In that case this Court declared (pp. 566-567 of 258 U. S.):

> "The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that *any person* within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to *a single man* we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. *An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. Osborn* v. *Bank of United States,* 9 Wheat. 738, 842, 843; *United States* v. *Lee,* 106 U. S. 196, 213, 221. The opposite notion left some traces in the law, 1 Roll. Abr. 95, Action sur Case, T., but for the most part long has disappeared.

> "If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law." (Italics ours.)

We think that the words of the Court in that case certainly apply to a suit against the Trustees of the Postal Savings System. Instead of creating a corporation, the Act of Congress created a board of trustees, consisting of persons, who under established rules of law are answerable for their wrongful acts, and who can under those established rules be sued in their capacity as trustees without any express or implied power as in the case of corporations.

With respect to *Osborn* v. *Bank of United States,* 9 Wheat. 738, and *Davis* v. *Gray,* 16 Wall. 203, the respondents urge that the rule of these cases has long been discarded (Brief, p. 11). In *Osborn* v. *Bank of United States, supra,* at page 870 the Court said:

> "Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title."

In the decision of this Court in *Sloan Shipyards* v. *United States Fleet Corporation, supra* (pp. 566-567), *Osborn* v. *United States, supra,* was cited with approval.

This Court also cited *Davis* v. *Gray, supra,* and quoted from the decision in that case with approval in *United States* v. *Lee,* 106 U. S. 196 at pages 207-208. We cannot find any decision discarding the rule of these cases and the respondents have not cited in their brief any case or cases which overrule them.

Finally the respondents state (Brief, p. 12):

> "* * * it is well settled that a suit against an official of the United States to litigate title to property held by the official for the United States—and that is what, in essence, the present action is—is a suit against the United States, and cannot be maintained."

This statement is also made in Note 3, page 5 of respondents' brief and cases are cited in support of the proposition. However, neither the proposition of law, as stated by the respondents, nor the cases cited are in point here for, as developed hereinbefore in this brief and in the petition for certiorari, neither the postal savings funds nor the bonds here involved are held in trust by the trustees of the Postal Savings System for the United States.

The postal savings funds are held in trust separate and apart from the funds of the United States for the benefit not of the United States but for the depositors in the Postal Savings System. *Annie Leka, Administratrix* v. *United States, supra.* The bonds are held by the Treasurer of the United States (who is ex-officio treasurer of the board of trustees of the Postal Savings System) as pledgee in trust for the Woodlawn Bank to secure deposits to the credit of the trustees of the Postal Savings System (not deposits to the credit of the United States). As developed in the petition for certiorari and as held by the court below, the pledge was illegal and it is the duty of the Treasurer of the United States to return the bonds to the petitioner herein as receiver of the Woodlawn Bank.

In attempting to destroy the effect of the holdings in *United States* v. *Lee,* 106 U. S. 196, and *Tindal* v. *Wesley,* 167 U. S. 204, respondents say that they were ejectment actions against officials and were maintainable against the officials in their individual capacities because an ejectment action does not litigate the title but only the right to possession of the defendant. Just what effect that distinction has, if there is any such distinction, is not shown.

However, it may be noted that in *Marshall* v. *Ladd*, 131 U. S. (appendix) lxxxix (19 L. Ed. 153) this Court said:

> "It is of the essence of the action of ejectment that the legal title must prevail, * * *."

Likewise, in *McGuire* v. *Blount*, 199 U. S. 142, this Court said (p. 144):

> "It is elementary law that the plaintiff in ejectment must recover upon the strength of his own title, * * *."

However, in this case the title of the plaintiff to the securities sought to be recovered is not and cannot be questioned. It is conclusively shown and is conceded by the respondents that petitioner has title to the securities sought to be recovered, and respondents do not claim that the United States have title to those securities, but merely claim that the United States have an interest in the securities by virtue of a pledge which respondents admit was illegal and void and of no force and effect and which therefore could not form any basis for a claim by the United States, to those securities.

CONCLUSION.

It is therefore respectfully submitted that the United States Court of Appeals for the District of Columbia erred in deciding that the United States were necessary and indispensable parties to this suit and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOMER D. DINES,
122 S. Michigan Ave.,
Chicago, Illinois.

LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.
Counsel for Petitioner.

WARREN H. ORR,
Of Counsel.

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CITATIONS

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In the Supreme Court of the United States

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CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION, PETITIONER

v.

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA; AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Court of Appeals for the District of Columbia (R. 112–119) is reported in 112 F. (2d) 401.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 29, 1940 (R. 120). The petition for a writ of certiorari was filed July 22, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is an indispensable party defendant to a suit by a receiver of a state bank against the trustees and treasurer of the Postal Savings System to recover securities and the proceeds thereof which were pledged by the bank to secure deposits of postal savings funds.

STATUTES INVOLVED

The pertinent portions of the Postal Savings Bank Act are set forth in the Appendix.

STATEMENT

The Woodlawn Trust and Savings Bank was duly organized as a banking corporation under the laws of Illinois in 1905, and thereafter operated as a state bank in Chicago, Illinois (R. 22, 43). Postal savings funds were deposited in the bank from time to time between 1911 and 1932, and the bank, to secure the repayment of the deposits, delivered various bonds, which were part of its assets, to the Treasurer of the United States (R. 22). In

1932 the state auditor of Illinois found that the capital stock of the bank was impaired, and accordingly, took possession of the bank and appointed a receiver (R. 22, 43–44).[1] When the bank closed it held postal savings deposits to the amount of $454,793.04, no part of which has been repaid (R. 25).

On April 14, 1938, the date of the decree of the District Court, William Julian, Treasurer of the United States and *ex officio* Treasurer of the Board of Trustees of the Postal Savings System (R. 22, 43), held as security from the bank bonds in the aggregate principal amount of $457,500 (R. 22–25). He held the proceeds of other bonds also deposited as security, which had either matured or were redeemed, in the amount of $16,000 (R. 25). In addition he had received $90,657.96 interest on the pledged bonds, which he had credited to the Board of Trustees of the Postal Savings System (R. 25).

On October 28, 1935, William L. O'Connell, petitioner's predecessor as receiver of the bank, brought suit in the District Court for the District of Columbia against the Postmaster General, the Attorney General, and the Secretary of the Treas-

[1] H. C. Vernon was appointed receiver on July 1, 1932, and upon his resignation William L. O'Connell, original plaintiff in this action, was appointed receiver. After the death of O'Connell on July 24, 1936, Charles H. Albers, petitioner, was appointed receiver and substituted as party plaintiff (R. 21, 22, 43, 44).

ury, as trustees of the Postal Savings System, and against the Treasurer of the United States in that capacity and as Treasurer of the Board of Trustees of the Postal Savings System, for the recovery of the pledged bonds or their proceeds, plus interest thereon amounting to $106,657.96 (R. 1–14). The basis of the suit was that under Illinois law [2] the bank had no power to pledge assets to secure deposits (R. 1–13). The District Court granted the relief requested. It ordered the defendant Julian, as Treasurer of the United States, to turn over to petitioner as receiver of the bank the pledged bonds in his possession (R. 31–33), and ordered the trustees to pay, or cause to be paid, out of postal savings funds, $106,657.96 and any additional money received as principal or interest on the bonds (R. 33–34). The District Court held that the suit was not against the United States and that the United States was not an indispensable party defendant (R. 29). On appeal, the United States Court of Appeals for the District of Columbia reversed on the ground that the United States was an indispensable party defendant (R. 112–119).

ARGUMENT

The Court of Appeals held that the suit might not be maintained in the absence of the United States as a party, because under the statutory struc-

[2] *People* v. *Wiersema State Bank*, 361 Ill. 75, 197 N. E. 537; *People* v. *Cairo-Alexander County Bank*, 363 Ill. 589, 2 N. E. (2d) 889.

ture of the Postal Savings System the United States had an interest in the pledged security, and was, therefore, an indispensable party to any suit to control its disposition, and because the suit sought to compel the respondents to exercise their official power over property held by them as officers of the United States.[3]

The decision below thus turned on the structure of the Postal Savings System. The system was established by the Postal Savings Bank Act, set out in the Appendix. Under the Act the system is administered by a board of trustees consisting of the Postmaster General, the Secretary of the

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[3] It is, of course, well settled that a suit nominally against an officer is in reality a suit against the United States if the relief granted or sought will finally determine the right to property in which the United States has or claims an interest. *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *Louisiana* v. *Garfield*, 211 U. S. 70; *Morrison* v. *Work*, 266 U. S. 481, 485; *Louisiana* v. *Jumel*, 107 U. S. 711; *Lankford* v. *Platte Iron Works*, 235 U. S. 461. In the *Lankford* case a depositor in an insolvent state bank brought suit to compel payment of his deposit by the Oklahoma State Banking Board out of the Depositors' Guaranty Fund. The Court held that the suit was against the state since the state had legal title to the fund and had an interest that the fund be administered by the officers it had appointed.

It is likewise well settled that a suit cannot be maintained to control the conduct of officers in their official capacity. *Belknap* v. *Schild*, 161 U. S. 10, 25; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296. Suits to require the performance of a ministerial duty are, of course, an exception to this rule. See *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386.

Treasury, and the Attorney General, acting *ex officio* (39 U. S. C., § 751). The trustees submit a report to Congress at each session (*id.*). Mail matter pertaining to the business of the system enjoys franking privilege (39 U. S. C., § 752). Every post office designated by the Postmaster General is a postal savings depository office (39 U. S. C., § 753). The Act makes detailed provision for deposits, at interest, and for withdrawals (39 U. S. C., §§ 753–758). Postal savings funds are deposited, at interest, in solvent banks, except that a specified reserve is kept with the Treasurer of the United States, who is treasurer of the board of trustees (39 U. S. C., § 759). To insure the safety of deposited funds the Act directs the board of trustees to take security from the banks (*id.*). When, in the judgment of the President, the interests of the United States so require, the board of trustees may invest all the postal savings funds, except the reserve, in securities of the United States[4] (*id.*). Any profit from the system is to be covered into the Treasury of the United States as a part of the postal revenue[5] (*id.*). In some

[4] Pursuant to this provision almost one hundred million dollars werei nvested by the board in Liberty bonds during 1917–1919. H. Doc. No. 133, 67th Cong., 2d Sess., p. 3.

[5] We are informed by the Post Office Department that the total net profits of the operation of the system since its establishment amounted to more than $65,000,000 as of November 1939. And see Annual Reports of the Operations of the Postal Savings System, 1914–1939; Annual Report of the Postmaster General, 1939, pp. 36, 41, 97.

circumstances a depositor may surrender his deposit and receive United States bonds in lieu thereof (39 U. S. C., § 760). Postal savings depository funds are directed to be kept separate from other funds, and detailed provision is made for their safekeeping (39 U. S. C., §§ 762, 765). The Postmaster General is authorized to require postal employees to transact, in connection with their other duties, such postal savings depository business as may be necessary (39 U. S. C., § 764). "The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices * * *" (39 U. S. C., § 766).

1. Petitioner contends (pp. 7–11, 23–26) that the decision below is in conflict with *Leka, Admx.* v. *United States,* 69 C. Cls. 79. That was a suit against the United States by an administrator to recover postal savings deposits made by the decedent.[6]

[6] While the suit was nominally against the United States, the controversy was in reality between rival administrators, each of whom was claiming the decedent's deposit. The Government, of course, had no interest in the controversy and the files of the Department of Justice show that no brief was filed for the United States, although the report of the case indicates that an appearance was entered for it. The opinion of the court reflects quite plainly that the court was influenced in its decision by the real nature of the controversy before it, inasmuch as it lacked jurisdiction to decide a controversy between private parties. The court seemed to feel that determination of the controversy between the administrators was, at least in the first instance, for the Postmaster. See 69 C. Cls. at 89.

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The Court of Claims held that the suit could not be maintained. It stated that the debt due on the deposit was not a liability of the United States payable out of its funds, but was payable out of the funds in the hands of the trustees of the Postal Savings System. The statutory provision pledging the faith of the United States to the payment of postal savings deposits, means, the court said, that the United States is pledged to make good any deficiency in the funds in the hands of the trustees, but does not mean that the United States can be sued by a depositor when there is no such deficiency. "The United States has nowhere in this act provided for a suit against it or consented to be sued. * * * The contract involved is not with the United States." 69 C. Cls. at 88.

In the case at bar the court said, in the course of its opinion, that the postal savings fund originated in the deposit of money "with the United States", that it was deposited "by the United States" in a bank and security was taken for its repayment; that the statute under which the deposit was received gave the President the right to invest it; and that the credit of the United States was pledged for its repayment (R. 118). And the court added (R. 118–119):

> This, at the very least, created as between depositor and government the relationship of debtor and creditor, and gave the United

> States full control of and full responsibility for its disposition.

Petitioner assumes (Pet. 8) that this statement was the basis of the holding that the United States was an indispensable party, and asserts that the decision below is thus in conflict with the *Leka* case on whether postal savings funds constitute money belonging to the United States and on whether a postal savings deposit creates a debt or liability of the United States.

In the first place, the opinion shows that the court did not mean to say that the United States as distinguished from its instrumentality, the Postal Savings System, was the debtor of the depositor and had control of and responsibility for the disposition of the deposit. Rather the court, in the quoted portion of its opinion, was considering the Postal Savings System a part of the United States Government, and had no distinction in mind between the system and the government proper. Thus the court spoke, in the same paragraph, of the deposit of money "with the United States", of the receipt of the money "by the United States", and of the deposit of the money in a bank "by the United States" for safekeeping (R. 118). It was, of course, the Postal Savings System with which the money was deposited and which in turn deposited it in a bank. Earlier in the opinion the court recognizes that the postal savings deposit was not public moneys "strictly speaking," al-

though it was "for all practical purposes money belonging to the United States" (R.119).[7]

In the second place, the quotations from the opinion below and from the *Leka* opinion upon which petitioner relies as establishing a conflict are but dicta. Whether the United States has assumed a contractual obligation to postal savings depositors on which it may be sued under the Tucker Act—the question presented in the *Leka* case—is not decisive of whether the United States is an indispensable party to a suit to reach securities given to secure deposits of postal savings funds. Compare *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, with *Minnesota* v. *United States*, 305 U. S. 382, 386. The court below held that the United States was an indispensable party because the suit sought to establish title to property in which the United States had an interest, and because the suit sought to control the official activities of federal officers. Neither ground is dependent upon the existence of a contractual obligation between the United States and postal savings depositors on which the former could be sued in the Court of Claims.

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[7] The court referred to the opinion of this Court in *Inland Waterways Corp.* v. *Young*, decided March 25, 1940, in which this Court referred to postal savings funds, among others, as "deposits of a governmental nature", and stated that funds of government corporations "are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses."

2. Petitioner also asserts that the decision below is in conflict with various enumerated decisions of this Court. None of the cases cited is in conflict with the decision below; most are not even particularly relevant to it.

Many of the cited cases hold or assume that some particular federal instrumentality is suable. *United States Bank* v. *Planters' Bank*, 9 Wheat. 904; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549; *Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519; and *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. In such cases the question is whether Congress intended that the instrumentality should enjoy the Government's immunity, and the intention, if not expressed, is to be determined by consideration of various relevant circumstances. In the case at bar there is no express congressional consent to suit against the trustees, and petitioner does not point to any circumstance from which an implied consent is to be inferred. Rather, petitioner asserts broadly that instrumentalities of the United States are suable, and that the United States is not an indispensable party to suits against them.

Osborn v. *United States Bank*, 9 Wheat. 738, and *Davis* v. *Gray*, 16 Wall. 203, were held not to be suits against the sovereign on the ground that that question was to be determined by the party

named as defendant, but this rule has long been discarded. See *In re Ayers,* 123 U. S. 443, 487. *Houston* v. *Ormes,* 252 U. S. 469, and *Mellon* v. *Orinoco Iron Co.,* 266 U. S. 121, were suits against officers to require the performance of a ministerial duty imposed by Act of Congress. *United States* v. *Lee,* 106 U. S. 196, and *Tindal* v. *Wesley,* 167 U. S. 204, were ejectment actions against officials, and were maintainable against the officials in their individual capacities because an ejectment action does not litigate the title but only the right to possession of the defendant, so that the United States would not be bound by a judgment in ejectment against its officers. See 106 U. S. at 217, 222; 167 U. S. at 223; *Carr* v. *United States,* 98 U. S. 433, 437–438; *Hussey* v. *United States,* 222 U. S. 88, 93. As stated, note 3, *supra,* p. 5, it is well settled that a suit against an official of the United States to litigate title to property held by the official for the United States—and that is what, in essence, the present action is—is a suit against the United States, and cannot be maintained. Similarly *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, was not a suit to adjudicate title to property, but was brought to enjoin allegedly illegal interference by an official with the plaintiff's property.

CONCLUSION

The decision below is correct and follows principles well settled in the decisions of this Court.

There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
Special Assistant to the Attorney General.
THOMAS E. HARRIS,
WALTER S. SURREY,
Attorneys.

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APPENDIX

Postal Savings Bank Act of June 25, 1910, c. 386, 36 Stat. 814, as amended, 39 U. S. C. 751 *et seq.* (The provisions are set forth below as they appear in the Code.)

SECTION 751. *Board of trustees; regulations; annual report.*—There shall be a board of trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this chapter, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Postmaster General, the Secretary of the Treasury, and the Attorney General, severally, acting ex officio, and, except as otherwise provided by section 768 of this title, shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices.

The board of trustees shall submit a report to Congress at the beginning of each regular session showing by States and Territories (for the preceding fiscal year) the number and names of post offices receiving deposits, the aggregate amount of deposits made therein, the aggregate amount of withdrawals therefrom, the number of depositors in each, the total amount standing to the credit of all depositors at the conclusion of the year, the amount of such deposits at interest, the amount of interest received thereon, the amount of interest

paid thereon, the amount of deposits surrendered by depositors for bonds issued by authority of this chapter, and the number and amount of unclaimed deposits. Also the amount invested in Government securities by the trustees, the amount of extra expense of the Post Office Department and the Postal Service incident to the operation of the postal savings depository system, and all other facts which it may deem pertinent and proper to present.

SECTION 752. *Mail pertaining to business transmitted free.*—The provisions of section 321 of this title are hereby extended and made applicable to all official mail matter pertaining to the business of the Postal Savings System.

SECTION 753. *Designation of offices.*—Every post office designated by order of the Postmaster General is declared to be a postal savings depository office within the meaning of this chapter and to be authorized and required to receive deposits of funds from the public and to account for and dispose of the same, according to the provisions of this chapter and the regulations made in pursuance thereof.

SECTION 754. *Opening accounts and making deposits.*—Accounts may be opened and deposits made in any postal savings depository established under this chapter by any person of the age of ten years or over, in his or her own name, and by a married woman in her own name and free from any control or interference by her husband; but no person shall at the same time have more than one postal-savings account in his or her own right.

* * * * *

SECTION 759. *Deposit of funds in banks; interest; reserve; security; deposits with*

treasurer of board of trustees.—Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than 2¼ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand: *Provided,* That no such security shall be required in case of such part of the deposits as are insured under section 264 of Title 12. The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. If one or more member banks of the Federal reserve system exists in the city, town, village, or locality where the postal savings deposits are made, such deposits shall be placed in such qualified member banks substantially in proportion to the capital and surplus of

each such bank, but if such member banks fail to qualify to receive such deposits, then any other bank located therein may, as hereinbefore provided, qualify and receive the same. If no such member bank and no other qualified bank exists in any city, town, village, or locality, or if none where such deposits are made will receive such deposits on the terms prescribed, then such funds shall be deposited under the terms of this chapter in the bank most convenient to such locality. If no such bank in any State or Territory is willing to receive such deposits on the terms prescribed, then such funds shall be deposited with the treasurer of the board of trustees and shall be counted in making up the reserve of 5 per centum. Such funds may be withdrawn from the treasurer of said board of trustees, and all other postal savings funds, or any part of such funds, may be at any time withdrawn from the banks and savings depository offices for the repayment of postal savings depositors when required for that purpose. If at any time the postal savings deposits in any State or Territory shall exceed the amount which the qualified banks therein are willing to receive under the terms of this chapter, and such excess amount is not required to make up the reserve fund of 5 per centum hereinbefore provided for, the board of trustees may invest all or any part of such excess amount in bonds or other securities of the United States. When, in the judgment of the President, the general welfare and interests of the United States so require, the board of trustees may invest all or any part of the postal savings funds, except the reserve fund of 5 per centum herein provided for, in bonds or other securities of the United States.

The board of trustees may in its discretion purchase from the holders thereof bonds which have been or may be issued under the provisions of section 760 of this title. Interest and profit accruing from the deposits or investment of postal savings funds shall be applied to the payment of interest due to postal savings depositors, as hereinbefore provided, and the excess thereof, if any, shall be covered into the Treasury of the United States as a part of the postal revenue. Postal savings funds in the treasury of said board shall be subject to disposition as provided in this chapter, and not otherwise. The board of trustees may at any time dispose of bonds held as postal savings investments and use the proceeds to meet withdrawals of deposits by depositors. The word "Territory" as used herein shall be held to include the District of Columbia, and Puerto Rico, and the word "bank" shall be held to include savings banks and trust companies doing a banking business.

* * * * *

SECTION 762. *Funds kept separate; accountability therefor; application of laws relating to postal receipts; additional bonds of postmasters.*—Postal savings depository funds shall be kept separate from other funds by postmasters and other officers and employees of the Postal Service, who shall be held to the same accountability under their bonds for such funds as for public moneys; and no person connected with the Post Office Department shall disclose to any person other than the depositor the amount of any deposits, unless directed so to do by the Postmaster General. All statutes relating to the safekeeping of and proper accounting for postal receipts are made applicable

to postal savings funds, and the Postmaster General may require postmasters, assistant postmasters, and clerks at postal savings depositories to give any additional bond he may deem necessary.

* * * * *

SECTION 764. *Duties of postmasters and other officers.*—The Postmaster General is authorized to require postmasters and other postal officers and employees to transact, in connection with their other duties, such postal savings depository business as may be necessary; and he is also authorized to make, and with the approval of the board of trustees to promulgate, and from time to time to modify or revoke, subject to the approval of said board, such rules and regulations not in conflict with law as he may deem necessary to carry the provisions of this chapter into effect.

SECTION 765. *Application of safeguards for protection of public moneys and of laws as to offenses against Postal Service.*—All the safeguards provided by law for the protection of public moneys, and all statutes relating to the embezzlement, conversion, improper handling, retention, use, or disposal of postal and money-order funds and the punishments provided for such offenses are hereby extended and made applicable to postal savings depository funds, and all statutes relating to false returns of postal and money-order business, the forgery, counterfeiting, alteration, improper use or handling of postal and money-order blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor, with the penalties provided in such statutes, are hereby extended and made applicable to postal savings depository business, and the

forgery, counterfeiting, alteration, improper use or handling of postal savings depository blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor.

SECTION 766. *Faith of United States pledged to payment of deposits.*—The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided.

SECTION 767. *Judgment adjudicating right or interest in deposit.*—The final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sums deposited by any person with a postal savings depository if the same shall not have been appealed from and the time for appeal has expired shall, upon submission to the Postmaster General of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any State or Territory or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, be accepted and pursued by the board of trustees as conclusive of the title, right, interest, or possession so adjudicated, and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States from the claim or demand of any person or persons to the same.

* * * * *

SECTION 769. *Transaction of business of Postal Savings System.*—The Secretary of

the Treasury may employ such number of clerks and employees of the several classes and at the several rates of compensation recognized by law, and expend such sums for contingent and miscellaneous items, as may be necessary, in his judgment, to transact the business of the Postal Savings System in the office of the Treasurer of the United States: *Provided,* That the money required to pay such clerks and employees, and contingent and miscellaneous items, shall be advanced to the Secretary of the Treasury at regular intervals out of any available appropriation for the establishment, maintenance, and extension of postal savings depositories: *Provided further,* That estimates hereunder shall be submitted in detail annually.

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